SERVED: October 4, 2005

NTSB Order No. EA-5178

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of September, 2005

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. JAMES M. CULLITON, Respondent.	)	Docket No. SE-16894

OPINION AND ORDER

Respondent and the Administrator have appealed from the decisions of Administrative Law Judge Patrick G. Geraghty in this matter revoking all of respondent's airman certificates.[1] Judge Geraghty issued two written orders: one addressing respondent's motion to dismiss and the other granting partial summary judgment in favor of the Administrator. The law judge also issued an oral

[1] In addition to the medical certificate, respondent holds airline transport pilot, flight instructor, and ground instructor certificates, as well as a mechanic certificate with airframe and powerplant ratings.

decision following an evidentiary hearing held on June 17, 2004, on the issue of sanction.[2] He affirmed revocation of all but respondent's mechanic certificate. We grant the Administrator's appeal in part and deny that of respondent.

Mr. Culliton's appeal. This case stems from respondent's answers on his June 6, 1997 medical application. Although the designated aviation medical examiner (AME) approved issuance of the second class medical certificate respondent sought, the FAA determined not only that respondent had a number of potentially disqualifying conditions, but that he had not reported them on the 1997 application.[3] Based on this failure, the Administrator seeks revocation under 14 C.F.R. 67.403(a)(1), which prohibits intentionally false or fraudulent statements on an application for a medical certificate.

Before this case was brought by the FAA, respondent was prosecuted in the Federal District Court for the Eastern District of California. Following a jury trial, respondent was convicted of making a false statement on this same June 1997 application, in violation of Title 18, Section 1001(a)(2) (a felony) and based on the same answers that are our subject here. The Ninth Circuit Court of Appeals affirmed. United States v. Culliton, 328 F.3d 1074 (9th Cir. 2003). This proceeding followed.

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[2] The law judge's decisions are attached.

[3] Respondent checked "no" when the application asked whether he had or had ever had: (1) "eye or vision trouble except glasses"; (2) "dizziness or fainting spells"; and (3) "mental disorders of any sort: depression, anxiety, etc."

One of the arguments raised here by respondent is that the law judge improperly applied the doctrine of res judicata.[4] Under this doctrine, a final judgment on the merits of an action precludes the party common to both proceedings from relitigating issues that were or could have been raised in that action. Oriel v. Russell, 278 U.S. 358, 410 (1929), 18 Fed. Prac. & Proc. Juris 2d § 4417. The Administrator argues and the law judge found that these requirements were met here and the holdings in the criminal case foreclose respondent from raising those issues here. We agree. In this case, the issue is exactly the same: whether respondent intentionally falsified his June 1997 application. Indeed, the burden of proof in the criminal case is much greater than in this one.

Respondent on appeal does not directly address why he believes the law judge's finding of res judicata was wrong. He contends that the AME for the June examination advised him how to complete the form and he followed that advice. He argues that we could have allowed testimony of other pilots of their experiences with the same AMEs where the judge in the criminal case did not. He seeks to testify before us to that effect. Respondent testified on this point in the criminal trial and the judge ruled on the admissibility of the other pilots' testimony. Because of res judicata he may not attempt to relitigate this now. In any case, even were there evidence that establishes that the AMEs

[4] Also related to and sometimes called issue preclusion, claim preclusion, and collateral estoppel, among other terms.

assisted other pilots in filling out the form and that the pilots relied on them, this does not trump the wording of the form "have or ever had" for its simplicity, or the doctors' testimony in the criminal case regarding their normal procedures. We think it unlikely that the AMEs would be so unaware of the process that they would advise pilots only to report for the prior year, as respondent contends. It is also not the AME's responsibility, as he is not familiar with all of respondent's medical history, to interrogate respondent to ensure every answer is correct.

Respondent contends that the law judge could not judge credibility when he did not hear the witnesses. The jury did, however. The remainder of respondent's arguments on this subject address the notion that a hearing here could result in a different outcome. That may be, but res judicata prevents such a result, and rightly so.[5]

[5] Even if res judicata did not apply, there is more than sufficient evidence in the record to prove, without a further hearing, that respondent's answers on the three subjects were false statements of material facts made with knowledge of their falsity. (See Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976).) The medical evidence, presented under oath in arguments to the court in the criminal case and which respondent had full opportunity to counter, demonstrates the falsity of respondent's answers. Respondent visited doctors a number of times between late 1995 and June of 1997 complaining of blurred vision, spots before his eyes, double vision, and eyes "locking" in one direction, as well as dizziness and vertigo most likely caused by an accident with an office chair that left him with what the doctors called "post concussion syndrome." As to the mental disorders issue, respondent had anxiety, problems concentrating, and "personality type" changes, according to one doctor. He had difficulty finding words, and with his memory.

There is no doubt that the answers are material. They are used to determine whether the applicant is fit to hold an airman

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In his earlier order, the law judge also rejected respondent's affirmative defenses of laches and waiver. We agree with these rulings. The laches argument invokes our stale complaint rule. That rule provides that when the complaint alleges offenses that occurred more than 6 months prior to the Administrator advising respondent as to the reasons for the proposed action, respondent may file a motion to dismiss and the Administrator then has the burden of proving that good cause existed for the delay. 49 C.F.R. 821.33. A longstanding exception to the rule exists in the case of orders of revocation because revocation brings into question the qualifications of the individual. 49 C.F.R. 821.33(b). The Administrator's decision to wait to issue the Order of Revocation until the criminal proceeding was finally decided was also a reasonable one and we agree with the law judge's finding that it did no harm to respondent.[6]

Lastly, respondent argues that this proceeding is barred by a plea agreement reached in a different and unrelated criminal

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certificate. Lastly, circumstantial evidence can be used to prove intent. Respondent argues that the form is unclear. The 9th Circuit rejected this argument. United States v. Culliton, *supra*, at 5708-5711. Moreover, the medical applications in the record show that respondent in this same June 1997 application and on earlier ones completed the application properly, checking boxes and then explaining that the matter had been previously reported. And, in 1989 the FAA wrote a letter to respondent indicating that the form did not apply only year to year.

[6] Indeed, for res judicata to apply, the prior decision must be a final one.

proceeding. We have held that such agreements do not bind the FAA. Administrator v. Beauchemin, NTSB Order No. EA-4371 (1995). Further, there is testimony in the record by way of an affidavit of an Assistant U.S. Attorney that he had explained to respondent that he could not bind another federal agency. A plea agreement in entirely different litigation having nothing to do with the later cause of action does not preclude another federal agency from taking action against respondent based on different facts.

The Administrator's appeal. The Administrator appeals the law judge's failure to affirm her order revoking respondent's mechanic certificate.[7] The law judge found a number of factors mitigating against revocation of respondent's mechanic certificate, including the fact that it would likely be respondent's means of support.[8]

The Administrator is correct that the Board's authority to modify her orders is limited. We are bound by all validly adopted interpretations of law and regulations unless they are arbitrary, capricious, or otherwise not in accordance with law. The Administrator's regulation (67.403) authorizes revocation of

[7] The Administrator also appeals the law judge's decision to allow a hearing on the issue of sanction. It is not clear to us why the Administrator appeals this procedural matter when she is also appealing the substantive one, and we deny that request. The law judge did not abuse his discretion. While we might have acted differently, it was not unreasonable to hold a hearing on an issue the court did not address.

[8] Respondent was at the time facing a motion for disbarment based on his felony conviction. The Administrator points out that respondent had a federal disability retirement pension and the proceeds from a tort action against the chair company based

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all airman certificates for intentional falsification. In addition, her sanction policy, validly adopted, allows for the revocation of all airman certificates in the case of intentional falsification. We reverse the law judge and affirm the Administrator's order *in toto*.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's appeal is granted to the extent set forth in this order; and

3. The revocation of respondent's certificates shall begin 30 days after the service date indicated on this opinion and order.[9]

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS and HERSMAN, Members of the Board, concurred in the above opinion and order.

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on the office accident.

[9] For the purpose of this order, respondent must physically surrender his certificates to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).